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Chairman: Mr. ZARIF (Islamic Republic of Iran)

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The meeting was called to order at 10.10 a.m.

AGENDA ITEM 129: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-FOURTH SESSION (continued) (A/47/10, A/47/95, A/47/441-S/24559)

1. Mr. BERMAN (United Kingdom), speaking on behalf of the European Community and its member States, said that those States had become increasingly concerned at the frequent and widespread violations of international humanitarian law, including grave breaches of the Geneva Conventions. Moreover, despite existing provisions, including international conventions providing for universal jurisdiction and containing the principle "prosecute or extradite", which enabled certain crimes to be dealt with in national courts, those provisions had not proved sufficiently effective.

2. In recent years, the International Law Commission had been considering the whole question of an international criminal jurisdiction. The work done on the topic in 1992 by the Commission's Working Group had been particularly valuable and timely. The European Community and its member States believed that the Commission's request to be given a renewed mandate to draft the statute of an international criminal court with universal jurisdiction should be accepted. The report of the Working Group was a good basis. The renewed mandate should call on the Commission to complete its work in the shortest possible time.

3. In fulfilling the mandate, the Commission should take into account the views expressed during the current debate. The European Community and its member States also suggested that States should be given an opportunity to supply more detailed comments by early 1993 so that the Commission would be able to take them into account in its work at its 1993 session.

4. Mr. FLATLA (Norway), speaking on behalf of the Nordic countries, said that those countries supported the elaboration of a Code of Crimes against the Peace and Security of Mankind. However, many international crimes, such as genocide, war crimes, hijacking and sabotage of aircraft, the taking of hostages and illicit trafficking in narcotics were defined in existing and generally accepted treaty law. The establishment of an international criminal court which could investigate those crimes should not await the finalization of the draft Code, which could take considerable time. The Nordic countries were among those States which had difficulty in following the line of reasoning so far adopted for the draft Code; in due course they would submit written comments and observations on the provisional draft articles of the Code.

5. On the question of the establishment of an international criminal court or other international criminal trial mechanism, the Working Group had submitted a comprehensive report which formed an excellent basis for future work on the topic. The Commission noted in its report that it had concluded the task of analysis of "the question of establishing an international criminal court or other international criminal trial mechanism" and that

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further work on the issue required a renewed mandate from the General Assembly so that the Commission could proceed to the detailed work that would be required in drawing up a statute and associated rules of procedure for an international criminal jurisdiction. The Nordic countries were in favour of such a mandate being given. At the same time, their analysis of the Commission's proposals was without prejudice to their position on the proposals made elsewhere for the establishment of an international tribunal to punish those repsonsible for the war crimes that had been and were being committed in the former Yugoslavia.

6. The Working Group had expressed the opinion that a structure along the lines suggested in its report could be a workable system. The Nordic countries believed that it would be worthwhile to establish such a court. When drawing up the statute, the Commission must ensure that the system would be able to bring to trial those guilty of gross violations of international humanitarian law.

7. The Nordic countries shared the Commission's view that an international criminal court should be established by a statute in the form of a treaty agreed to by States parties and that the court should not be a full-time body. In paragraph 433 of its report, the Working Group pointed out that criminal justice systems at the national level were costly and complex, and that it would be very expensive to replicate such systems at the international level. The Nordic countries were prepared to consider the idea that the President of the court alone would act in a full-time capacity, and also the possibility of using the office of the Legal Counsel of the United Nations as a bureau for the court.

8. The Nordic countries agreed with the Working Group that the judges must be completely independent and act in their personal capacity, while at the same time possessing the necessary professional expertise. Care should be taken to ensure continuity and uniform legal practice within the court.

9. The Nordic countries endorsed the suggestion made by the Working Group that by becoming a party to the statute, a State would only accept certain administrative obligations and that acceptance of the jurisdiction of the court over particular offences would require a separate jurisdictional act. The Nordic countries also agreed that access to the court should be as open as possible, allowing States that were not party to the statute to accept the jurisidiction of the court on an ad hoc basis. On the other hand, they considered that the idea that international organizations should have the right to bring complaints before the court was premature.

10. Turning to the subject-matter of the court's jurisdiction ratione materiae, the Nordic countries supported the idea that the Code and the statute of the court should be separate instruments. With reference to paragraphs 449 to 451 of the Working Group's report, the Nordic countries believed that the treaties and conventions on the basis of which a court would

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adjudicate should be specified in advance, and that the court's competence should be limited to crimes of a serious nature.

11. The court's jurisdiction ratione personae was a most difficult question. The main reason for setting up an international court must be to establish a system that would be able to bring to trial those guilty of serious violations of relevant international law. Therefore, in the opinion of the Nordic countries, it was not in conformity with the concept of an international criminal court to require the consent of the country of which the perpetrator was a national.

12. Consideration should also be given to the question of whether the consent of the country in which the crime was committed should always be required. Particularly in cases of serious violations of human rights, it might be necessary for the court to be able to adjudicate the matter regardless of whether the State in question gave its consent. The Nordic countries shared the view that a court should apply to individuals only; they could in general endorse the system envisaged by the Working Group.

13. The report of the Working Group did not provide a basis for detailed comments on the question of the rules of criminal procedure to be applied by a court and the legal safeguards that must be fulfilled. However, the Nordic countries presumed that the legal rights of the accused would be adequately safeguarded; in that respect, he referred to the statement he had made in the Committee in 1991.

14. With regard to the principle nullum crimen sine lege, the Nordic countries agreed that it would be a matter for each State Party to ensure that its internal law gave effect to the treaties in force specifying crimes of an international character. However, the court's ability to bring guilty parties to justice should not depend on whether a violation took place within a State whose internal laws did not give effect to the treaties in force specifying the crimes in question, or was directed against another State whose internal laws did give effect to such treaties. The Nordic countries encouraged the Commission to consider carefully how such loopholes could be avoided.

15. As to the principle nulla poena sine lege, few, if any, of the treaties in force specifying crimes of an international character contained relevant penalties to be applied at the international level. The Nordic countries fully endorsed the view of the Working Group in that respect, and believed that a residual provision should apply in cases where no penalty had been specified in the treaty in force.

16. The Nordic countries lent their full support to the idea that the Code must refrain from imposing the death penalty. On the question of proceedings relating to compensation, the Nordic countries had reservations about the idea of intermingling strictly criminal proceedings and civil claims for damage, which should be dealt with under the topic of State responsibility.

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17. The Nordic countries endorsed the Working Group's suggestion that the court should not be empowered to try an accused person in absentia. The problem of how the accused should be brought before the court must be viewed in connection with the issue of which countries must give their consent to the court considering the case in question. Secondly, the Special Rapporteur was of the view that transferring an accused person to the court should not be considered as an extradition. Whether or not that was a correct approach depended on the interpretation of the internal legislation of the various countries. The Nordic countries, for their part, considered that such a transfer was a form of extradition.

18. The Nordic countries believed that the issue of extradition should be regulated in more detail in an annex or protocol to the statute of the court. The Working Group indicated in its report that it would be inclined to recommend a provision whereby States which had accepted the jurisdiction of the court with respect to an offence should be obliged to hand over an accused person to the court at the request of another State party that had accepted the same obligation. The Nordic countries were in favour of that approach.

19. The Nordic countries saw no reason why the court should not be associated with the United Nations in one way or another, as long as the court's independence was guaranteed. The Nordic countries encouraged the General Assembly to renew the mandate of the Commission to proceed with the drawing up of the statute and associated rules of procedure for an international criminal jurisdiction, based on the proposals of the Working Group and the guidance received from the Committee.

20. Mr. DESCHENES (Canada) said that the establishment of an international criminal jurisdiction had been debated at the United Nations since the 1940s without an agreement, since the separation of the world into blocs had prevented the achievement of the consensus necessary for that purpose. However, since the General Assembly had first invited the Commission to study the desirability of establishing such a judicial organ, and in the face of persistent violations of humanitarian law, human rights and international legal norms, it appeared that such a consensus might finally be emerging.

21. The International Law Commission had provided a basis for that consensus. Through its work over the previous 10 years, it had set out the framework of a consensus for a jurisdiction for prosecuting those accused of international crimes. Canada believed that the time had come to advance the work of the Commission by agreeing to its recommendations to begin the drafting of a statute for an international criminal jurisdiction. It would provide a permanent, neutral international forum to determine questions of individual criminal liability.

22. In its 1992 Report, the Commission noted that recent events on the international scene had clearly shown that the existence of such an organ could have provided a smooth way out of situations susceptible of leading to

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international friction. A court would provide a permanent mechanism capable of responding immediately to events as they occurred, since it could be triggered by States without the delay that might be necessary to negotiate the creation of an ad hoc tribunal. Such a body would strengthen the principle of universal jurisdiction over individuals who had committed international criminal acts, since it would objectively and uniformly implement criminal liability provisions from existing treaty law, with a significant deterrent value.

23. While the Sixth Committee had been aware from the outset of the need to examine the establishment of an international jurisdiction as part of the subject of international criminal liability, the focus of attention on such questions had begun to sharpen in 1989 and had continued until, at its forty-sixth session, the General Assembly had expressly invited the Commission to consider the proposals for the establishment of such a court (resolution 46/54). After extensive discussions and thanks to the contribution of its Working Group, the Commission had concluded that the establishment of such a structure was possible.

24. Canada concurred with that view and reiterated that the time had come for the General Assembly to provide the Commission with a clear mandate to draft the statute of an international criminal court. The Special Rapporteur and the Working Group had laid an excellent foundation for progress on the draft, which had his country's full support. The resolution to be adopted for that purpose should assign top priority to that measure so that the Commission could try to adopt a draft on first reading at the following year's session and could submit it to the Sixth Committee at the forty-eighth session of the General Assembly.

25. With regard to the jurisdiction of the court, the Commission proposed a flexible, viable and effective formula: the new legal body would have jurisdiction over a band of offences which was universally acceptable to members of the international community and which, moreover, could draw on all the crimes set out in the draft Code of Crimes against the Peace and Security of Mankind, which had been adopted on first reading by the Commission at its forty-third session. At the same time, his delegation recognized the need for further work on a range of technical legal questions connected with the establishment of an international criminal jurisdiction and, in particular, the aspects of jurisdiction, enforcement of decisions, and the guarantee of due process. Nevertheless, none of those technical problems was insurmountable.

26. He hoped that the resolution would call upon the Commission to draw on the contribution of all relevant branches of legal expertise in resolving the technical questions, particularly experts in international law and noted that the International Centre for Criminal Law Reform had planned to convene at Vancouver, Canada, in 1993, an international meeting of experts to advance thinking on the establishment of an international criminal court.

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27. In connection with the other elements of the Commission's work, he welcomed the tabling at the forty-sixth session of the General Assembly of the draft Code of Crimes, which had been adopted the previous year at first reading. His delegation, in keeping with the appeal made by the General Assembly in resolution 46/54, proposed to present its submissions in writing. The original mandate given to the Commission by the General Assembly in 1947 focused in particular on a small cluster of international crimes codified in the Nürnberg Charter. If the goal was universal acceptance and application, it was important for the drafters to focus on the common ground shared by States, rather than on less widely accepted categories of international criminal law.

28. Finally, his delegation believed that the two elements of individual criminal liability currently before the Commission, namely the court and the Code, would be best advanced on parallel but separate tracks. Canada supported the suggestion of the Working Group that any draft statute should hold open the option of adherence without necessarily becoming a party to an international code of crimes.

29. Mr. MONTAZ (Islamic Republic of Iran) said that the establishment of an international criminal jurisdiction to try persons accused of war crimes or violations of international law was a matter which had preoccupied students of international criminal law since the late nineteenth century and appeared in the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid.

30. In the Commission, the question had been closely linked since 1947 to the preparation of the draft Code of Crimes against the Peace and Security of Mankind. It was clear that the usefulness of the principles of Nürnberg and of an international criminal code was subject to the existence of an executing organ. Furthermore, the Commission had reached the conclusion that the establishment of such a jurisdiction raised no insurmountable legal difficulties, although there might be obstacles of a political nature owing to the reluctance of States to accept an international court which might call into question their sovereign rights.

31. In order to overcome those obstacles, it was necessary to establish a flexible and limited system of jurisdiction which preserved the principle of the universal jurisdiction of States recognized in various international conventions, based on the principle of universal punishment. Many States were reluctant to prosecute persons accused of international crimes who were located in their territory, but were also reluctant to allow their extradition owing to the absence of a suitable jurisdictional organ to try them. In that regard, the existence of an international organ mandated to fulfil that task would be useful and would fill that gap, provided that its jurisdiction was concurrent with national jurisdictions, in order to preserve the prerogatives that were inherent in the sovereignty of States.

(Mr. Montaz, Islamic Republic of Iran)

32. The acts of genocide committed against the Muslims of Bosnia and Herzegovina made it necessary to consider the possibility of extending to the Security Council right of access to such an international jurisdiction. It would be perfectly logical for the Security Council to be able, once it had determined the existence of violations of humanitarian law or other crimes of an international character, to initiate proceedings against the suspects.

33. Regarding the jurisdiction ratione materiae of the court, his delegation considered that its scope should not be restricted to offences classified in the future Code of Crimes against the Peace and Security of Mankind, or to precise offences, in order to make allowances for other international crimes that might result from the progressive development of international criminal law. However, the international community should agree upon certain general criteria that would make it possible to define offences that were truly of an international character. If no organic link was established between the Code and the future court, more States would be able to become party to the statute of the Court, without being compelled to accept the Code.

34. The Islamic Republic of Iran considered that the time was ripe for a decision on the desirability of establishing an international criminal court. Such a decision would unquestionably entail major political consequences and would depend on the political judgement of the members of the General Assembly. Until that decison had been taken, it would seem premature to begin to discuss technical matters such as the composition of the court, the penalties applicable or the trial system.

35. Mr. MIKULKA (Czechoslovakia) said that the history of the question of the establishment of an international criminal jurisdiction went back to 1950, when the Commission had reached the conclusion that the establishment of such a court was both possible and desirable. However, for want of a suitable climate, direct consideration of the issue had been postponed until the present. The idea of an international criminal court had been given a new thrust by the first reading of the draft Code of Crimes against the Peace and Security of Mankind, and above all by the consideration of the ninth and tenth reports of the Special Rapporteur on the question.

36. In compliance with the mandate received from the General Assembly (resolution 46/54, para. 3), the Commission had taken the view that its brief was to carry out a detailed and broad study of the issue, although restricting itself to analysis of technical aspects. His delegation approved of that approach, which seemed to be suited to the sensitive nature of the issue. The Working Group on an International Criminal Jurisdiction had selected the main issues raised by the question and had put forward concrete recommendations thereon, on the basis of the common denominator among the positions adopted during consideration of the two most recent reports of the Special Rapporteur. The Working Group had furthermore based its work on the assumption that in order to establish an international criminal jurisdiction it would be preferable to proceed in phases and had proposed a modest

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structure as an objective for the first phase. It had also considered the arguments for and against the establishment of an international criminal court. His delegation shared the view that the system of a national jurisdiction was insufficient to prevent international crime, in particular international crimes committed with the agreement of a State.

37. With regard to the conclusions of the Working Group contained in paragraph 396 of the Commission's report, his delegation agreed with the statement in subparagraph (i) that an international criminal court should be established by a statute in the form of a treaty, as that would ensure it operated independently and impartially. However, the possibility of establishing a mechanism by other means, and perhaps by a decision of the Security Council rather than a resolution of the General Assembly should not be excluded. Naturally, that method would solely apply in exceptional cases and the court thus established would be a special court.

38. Paragraph 396 (ii) contained a fundamental conclusion in respect of which there should be no doubt. It stated that a court should exercise jurisdiction only over private persons, as distinct from States. However, his delegation objected to the first sentence of the paragraph, which diminished the significance of the principle set out and again evoked the doctrine of the criminal responsibility of States, which his delegation could not support. Even setting aside doctrinal questions, it would be difficult to accept the suggestion that a single court could ever have jurisdiction simultaneously to try individuals and States through the same criminal procedure.

39. His delegation accepted the conclusion contained in paragraph 396 (iii) that the court's jurisdiction should be limited to crimes of an international character defined in specified international treaties in force. Such a requirement was suited to the first phase of the court's operation and was based on the objective of providing a simpler structure to set the mechanism under way. In that respect, attention should also be drawn to the linkage between the court and the Code of Crimes against the Peace and Security of Mankind. Once the Code had been adopted, it would be one of the treaties that came within the jurisdiction of the court. However, its jurisdiction should not be restricted to the crimes classified in the Code, no more than accession to the court's statute should be subordinated to accession to the Code. Otherwise the establishment of the court would be needlessly postponed and the possibility of widespread accession to the Statute would be considerably diminished.

40. Regarding jurisdiction ratione personae, both the Commission and the Working Group had considered the possible solutions to a potential conflict between the jurisdiction of the international criminal court and that of a State entitled to seek extradition by virtue of the aut dedere aut judicare principle. Although that was a sensitive issue, it was not insurmountable.

(Mr. Mikulka, Czechoslovakia)

41. Regarding paragraph 396 (iv), the court's jurisdiction would be concurrent with that of national jurisdictions and it would not be a compulsory jurisdiction, in the sense of a general jurisdiction which a State party to the statute was obliged to accept ipso facto. In the view of his delegation, that was a realistic solution on account of the flexibility it offered. The same flexibility would apply to the nature of the court, which would not be a standing body, but an institution which only came into operation when required. Regarding the possibility of establishing other mechanisms, his delegation shared the view of the Working Group that the only appropriate mechanism to consider serious criminal charges was a duly constituted criminal court. That was no reason for such cases not to be considered by other international mechanisms in order to enhance the effectiveness of national criminal jurisdiction.

42. By approving the recommendations contained in paragraphs 396 and 401 of its report, the Commission had completed the task entrusted to it by the General Assembly. It was now for the General Assembly to decide whether the Commission should undertake the detailed task of drafting the statute and rules of the international criminal court on the basis of the overall plan set out in the report of the Working Group. His delegation was prepared to support such a decision.

43. Mr. THIAM (Guinea), referring to the question of the establishment of an international criminal jurisdiction, said that the Commission had raised the issue of its mandate to the statute of an international criminal jurisdiction. His delegation supported the view that the Commission should be given a mandate to draft such a statute. In his view, a draft statute would facilitate a searching debate which would culminate with the submission of conclusions or recommendations to the General Assembly.

44. As far as the actual idea of establishing an international criminal jurisdiction was concerned, his delegation thought not only that it was timely and possible, but that the absence of an international body responsible for trying international crimes was a deficiency that should be made good. An international criminal jurisdiction would ensure the objective, impartial and uniform implementation of the Code of Crimes against the Peace and Security of Mankind. The Code would be ineffective if there was no jurisdiction to assert the authority of the international community in the struggle against such crimes.

45. While it was true that the sovereignty of States should not be infringed, it was also true that acceptance by States of the court's jurisdiction would be an act of sovereignty. It was simply a matter of determining, on the one hand, whether certain acts constituted crimes against humanity and should not remain unpunished and, on the other, whether the international community desired to bring into being the means of ensuring that punishment was inevitable.

(Mr. Thiam, Guinea)

46. The establishment ex post facto of an international criminal jurisdiction in the form of a multilateral treaty was preferable to the establishment of ad hoc bodies; a standing body would call for full-time judges, which would enhance their objectiveness and impartiality. Regarding whether the court's jurisdiction should be exclusive, optional, binding or concurrent, it would be the responsibility of States to make their decision known at the right moment. Flexibility was necessary in that respect. His delegation thought that the exercise of international judicial authority was incompatible with the principle of optional and concurrent jurisdiction, unless those crimes over which the court had exclusive jurisdiction were specifically identified, as the Commission had done in paragraph 41 of its report. Such a list would include all international crimes, and in particular those included in the Code of Crimes against the Peace and Security of Mankind.

47. The formal right to institute proceedings before the court should be vested in the State which had been the victim of the crime and in the Security Council, as the case might be. The law to be applied should be limited to the treaties defining crimes of an international character, with due observance of the universal principles of nullum crimen sine lege, nulla poena sine lege and non bis in idem, as well as the double jeopardy rule. Proceedings relating to compensation should be combined with criminal proceedings. Punishment in and of itself was not justice if there was no compensation for the damage caused by the crime. Accordingly, an international criminal court should have the power to rule in matters of civil liability. That would have the advantage of expediting matters.

48. The court should be organized in such a manner as to ensure review within the system of the court itself. To that end, a case should be heard in the first instance by a chamber of the court, and appeal should lie to the plenary court. The Guinean delegation agreed that the Commission should be given a renewed mandate to prepare a draft statute for an international criminal court.

49. Mr. BIGGAR (Ireland) said that, in the absence of guidance from the General Assembly, the Commission had not directly addressed the question of an international jurisdiction for several years, until the adoption in 1989 of General Assembly resolution 44/39. Since then, the topic had been considered repeatedly by the Commission and the Assembly had adopted resolutions 45/41 and 46/54, requesting the continuation of the work. At its most recent session, the Commission, after having considered the tenth report of the Special Rapporteur on the question of the possible establishment of an international criminal jurisdiction, had established a Working Group on the subject.

50. His delegation had noted that, in the report, the question of the establishment of an international criminal jurisdiction was not dependent on the adoption of a code of crimes against the peace and security of mankind. His delegation had also noted the Working Group's comment that the phase of preliminary consideration and analysis had been completed (A/47/10, para. 400).

(Mr. Biggar, Ireland)

51. Ireland was prepared to consider the possibility of establishing an international criminal jurisdiction outside the scope of the draft Code. It was likewise of the view that the time had come to proceed to a consideration of the practical problems connected with the establishment of an international court. Several issues arose at that stage, of which two were of particular interest: (a) which crimes would be considered by the court? and (b) what legal mechanism would be required for the effective functioning of the court?

52. With regard to the first question, his delegation endorsed the Working Group's view. Pending the entry into force of a code of crimes against the peace and security of mankind, the court's jurisdiction should extend to specified existing international treaties creating crimes of an international character. Only thus would certainty, an essential element of criminal law, be ensured. Ireland was likewise of the view that the court should deal only with a small number of exceptionally serious crimes which indicated a high level of moral and criminal guilt on the part of their alleged perpetrators.

53. As to the question of a legal mechanism, provisions should be adopted concerning: (a) an international criminal court; (b) the investigation of alleged offences; (c) the prosecution of charges; (d) safeguards for the accused; (e) penalties and their implementation and (f) a system of appeal.

54. The Irish delegation had already indicated its support for the creation of an international criminal court; however, the court, its jurisdiction and its powers must be established on a firm legal basis. The court's operation would have to meet very high standards of justice and fairness. In particular, the relationship between such a court and the national courts of Member States would need to be clearly defined, in order to avoid not only conflicts of jurisdiction but also double jeopardy. While concurrent jurisdiction appeared to be inevitable, consideration must be given to the opposite dangers arising from prior jurisdiction and a breach of the principle of non bis in idem. In that context, the handing over of an accused person was also likely to raise theoretical and practical problems. The Working Group's suggestion that such handing over was not an extradition was interesting, and his delegation awaited further development of that aspect. With regard to the investigation of alleged offences, the gathering of information should be carried out fairly, impartially and independently.

55. No court or legal system was infallible. Accordingly, in order to serve the cause of justice, provision should be made for an appeals procedure. For practical reasons, it would be desirable for that procedure to be applied within the structure of the court, rather than by a separate appeals court.

56. With regard to paragraph 15 of document A/47/10, the Irish delegation agreed that the Commission should embark on the elaboration of a draft Statute of an international criminal court and that it should be given a mandate to do so. The Working Group's basic propositions, as set out in paragraph 396 of the report, constituted a sound basis for the elaboration of such a draft statute.

57. Mr. BOS (Netherlands) said that, as suggested by the States members of the European Community, the General Assembly should request the Commission to give priority to the preparation of a draft statute for an international criminal court. Although it was aware that such a draft statute could not be produced on such short notice as to be of use in the case of the former Yugoslavia, his Government would prefer the establishment of a permanent court which could act whenever necessary.

58. After commenting on the main characteristics of the proposed international criminal court, he turned to the question of the court's legal basis, jurisdiction, composition and functioning, as well as prosecution and related matters.

59. With regard to the court's legal basis, his Government endorsed the Working Group's conclusion that an international criminal court should be established by means of a statute incorporated into a treaty among States parties, and should have jurisdiction over individuals accused of having committed a grave international crime.

60. As to jurisdiction, a distinction should be made between the subject-matter jurisdiction and the personal jurisdiction, and a decision should be taken as to whether the court's jurisdiction should be concurrent, exclusive or of a review character.

61. Jurisdiction ratione materiae basically depended on the relationship between the draft Code of Crimes against the Peace and Security of Mankind and the proposed international criminal court. The central issue was whether the court should have jurisdiction over some or all of the crimes defined as such in the Code, over crimes defined as such in other treaties and conventions, or even over crimes not yet defined as such in treaties or conventions In that respect, the Working Group had assumed that when a State became party to the statute of the court, it would stipulate the crimes in respect of which it accepted the court's jurisdiction. A number of members of the Commission had also argued that acceptance of the statute did not automatically imply acceptance of the court's jurisdiction over all the crimes defined in the Code. Linking the statute too closely to the Code would constitute an obstacle to States becoming party to it. Some members of the Commission had, however, underlined the close link between the Code and the court. Other members had regarded it as desirable that States should in any event automatically recognize the court's jurisdiction over a number of the crimes defined in the Code; they would then be free to decide whether or not to recognize its jurisdiction over other crimes.

62. As to the question of whether the court's jurisdiction extended to acts not defined as crimes in international conventions or treaties, but recognized as such under general international law or customary law or in certain resolutions of the Security Council, the Working Group's response had, in principle, been negative. He noted that some members of the Commission had been of the opinion that the application of the principle nullum crimen sine lege necessitated a restricted jurisdiction; his Government agreed that that

(Mr. Bos, Netherlands)

principle implied that only crimes defined in international conventions could be tried by the court.

63. With regard to the competence of the court, he said that if the draft Code was to be accompanied by an international law enforcement system with world-wide validity, the crimes to be included in it should meet certain requirements. In view of the reluctance of States to surrender powers in the field of criminal law and criminal law enforcement, it must be assumed that for the time being it would be possible only in exceptional cases to establish a form of international criminal law enforcement. His Government therefore felt that a form of world-wide criminal law enforcement was possible and desirable only in the case of crimes that contravened the elementary humanitarian principles generally accepted by the world community, crimes that were of such a nature that only international enforcement might offer some form of redress and crimes for which individuals could be regarded as accountable, regardless of whether the individual had acted in a public capacity. In the light of those criteria, his Government believed that the Code should include only the crimes of aggression, genocide, systematic or mass violations of human rights and serious war crimes.

64. The court's jurisdiction ratione materiae should be limited to the crimes defined in the code, but should extend to all of the crimes defined therein. The Code represented an evolution of international law not so much because it defined a number of acts as criminal but because it was to be accompanied by a system of international enforcement. In the view of his delegation, if the system was to be feasible, the Code should initially include only a limited list of crimes, thereby making a minimal encroachment on the national jurisdiction of States. For that reason, it did not advocate a Code which only defined crimes and did not provide for an enforcement mechanism. The court should have compulsory jurisdiction which each State party to the statute would be obliged to accept ipso facto and without further agreement; his Government therefore did not endorse the view of some members of the Commission and of the Working Group that recognition of the jurisdiction of the court should be optional for the time being.

65. On the question of whether the court should have exclusive competence, competence concurrent with that of national courts or the power of review only, the Commission had largely been of the opinion that the court should not have review powers. However, on the matter of whether its competence should be exclusive or concurrent, a number of members of the Commission had been in favour of the court being granted exclusive competence in the case of a limited number of serious crimes. His Government would therefore advocate a system which might be described as preferential jurisdiction; that meant that the court would be competent as soon as an individual was accused of having committed one of the crimes defined in the Code. However, if a case was not brought before the international criminal court, national courts would be, or would again be, competent to try the suspect. If the case was brought before the international criminal court, it would give judgement at first and sole instance.

(Mr. Bos, Netherlands)

66. In some cases, ensuring or promoting the court's right to exercise jurisdiction over individuals accused of having committed one of the crimes defined in the Code gave rise to a great many problems which would occur when drawing up the statute. Those problems included: whether the transfer of a suspect to the court constituted a form of extradition or a legal device sui generis; the relationship between the court's request for the transfer of a suspect and the request of another country for his extradition; and whether provision should be made for suspects to be tried in absentia.

67. In the opinion of his Government, the inclusion in national legislation of provisions recognizing universal jurisdiction in respect of the crimes defined in the Code, together with the preferential system of jurisdiction it advocated, would help considerably to make it possible for such crimes to be prosecuted before the international criminal court. In practice, however, situations would always arise in which a suspect was not transferred to the international criminal court by the country under whose jurisdiction he fell, especially in the case of States which were not party to the Code.

68. In relation to the prosecution of persons suspected of acts of aggression, the problem of the relationship between the court and the Security Council could arise. In that respect, many members of the Commission had taken the view that if the Security Council had expressed no opinion as to whether a specific act might be regarded as aggression, the court would be at liberty to determine the matter. However, opinion had been divided in the Commission as to what the consequences would be if the Security Council did express an opinion. His Government considered that regardless of whether the Security Council had considered the political question of whether a State was guilty of aggression, the court would be completely free to consider the legal question of whether an individual was guilty of the same crime. However, a pronouncement by the Security Council to the effect that an act of aggression had been perpetrated was so exceptional and had such far-reaching consequences that it must be deemed impossible for the court to reach a different decision. For that reason, his Government did not regard it as necessary for the Security Council to be assigned a specific procedural role in prosecutions relating to alleged acts of aggression.

69. In the opinion of his Government, procedure should be drawn up in accordance with the principles laid down in article 8 of the Code. In addition, his Government agreed with some members of the Commission that the court's procedure should fulfil the requirements contained in the universal human rights conventions, in particular those contained in articles 14 and 15 of the International Covenant on Civil and Political Rights. Currently, his Government was unable to answer the question as to whether the court should also be permitted or even obliged to apply national law, for example the law of the country in which the trial was to be conducted or in which the crime had been perpetrated, since much depended on the decisions that were made concerning the functioning of the court.

(Mr. Bos, Netherlands)

70. His delegation endorsed the Commission's view that a prosecutor's office should be established with responsibility for the prosecution of suspects before the court. The Commission rightly pointed out that procedure would depend too much on the capacities and wishes of individual States if they themselves were to be responsible for prosecutions. Smaller States, especially, would encounter problems.

71. In the opinion of his Government, the prosecutor's office could submit an application to the international criminal court (a) of its own accord, for example as a result of information provided by a State in which case, the prosecutor's office should accept information from government sources only; (b) in accordance with a decision of the United Nations General Assembly, in which case the prosecutor's office should be obliged to institute prosecution proceedings. Since there was no veto over the decisions of the General Assembly, it would, in principle, be possible to prosecute nationals of States that were Permanent Members of the Security Council; (c) in response to an order issued by the international criminal court, which could be issued at the request of a State, should the prosecutor's office not wish to institute prosecution proceedings on the basis of information provided directly by that State.

72. The number of countries entitled to bring a case before the court or to agree to a case being brought before the court should not be too limited. Ultimately, the crimes to be included in the draft Code should be those which were universally recognized and subject to universal jurisdiction in accordance with national legislation. Accordingly, any country which was a party to both the Code and the Statute should be able to submit a case to the Prosecutor's Office; it was not necessary that a State should have an interest or be involved in the crime in question. Further consideration should be given to ways in which the Prosecutor's Office could make use of the services of national judicial bodies and/or prosecutorial organs. Regulations governing such international judicial assistance must be elaborated in order to ensure the proper functioning of the court and the Prosecutor's Office.

73. In accordance with the principle nulla poena sine lege, the draft Code must provide for penalties; as the Code applied only to very serious crimes, it would be sufficient to impose similar penalties for all crimes. The penalties might range from prison sentences and measures restricting freedom of movement to the confiscation of assets obtained, for example, through the commission of a crime. His Government would oppose the inclusion of the death penalty in the draft Code in view of the trend towards its abolition and the possibility that some States might be prevented from becoming parties to the Code by the provisions of national and international law.

74. The implementation of the penalties to be imposed on convicted persons also required further attention. His Government agreed that prison sentences should be served in accordance with the United Nations Minimum Standard Rules

(Mr. Bos, Netherlands)

for the Treatment of Prisoners. The Netherlands also endorsed the view that a separate, permanent, international prison facility would be too costly and that prison sentences must therefore be served in the penal institutions of States parties to the Code.

75. With regard to the composition of the court, his Government agreed that, in the first phase of its operations, at least, the court should not be a standing full-time body. It should consist of from five to seven independent judges chosen in accordance with the procedures used for the International Court of Justice. While the court should be independent of the International Court of Justice, that did not imply that judges of the International Court of Justice might not also act in the same capacity on the international criminal court, or that other forms of joint organization might not underscore the universal character of the international criminal court.

76. Lastly, the Prosecutor's Office should consist of a Procurator-General, appointed by the General Assembly, assisted by one or more Advocates-General and a small support staff. The Commission was of the view that the Secretary-General's role as chief administrative officer of the United Nations would prohibit his functioning officially as chief of the Prosecutor's Office because of the objectivity which the Secretary-General must maintain in discharging his responsibilities under the Charter of the United Nations.

77. Mr. WILLIAMSON (United States of America) said that the Commission's report (A/47/10) contained an excellent legal analysis of some of the issues connected with the establishment of an international criminal court and that it was an essential step towards the creation of such an institution. The report exemplified the kind of relationship which should exist between the Commission and the General Assembly.

78. Nevertheless, the United States had, in its preliminary review of the report, identified several important issues that the Commission had not addressed. In view of the importance of the subject and the complexity of the issues addressed in the report, the United States believed that it was neither necessary nor desirable for the Sixth Committee or the General Assembly to request further work by the Commission on the possible establishment of an international criminal court at the current session.

79. The United States believed that individual States must take a firm stand on the question of whether the elaboration of a draft statute for an international criminal court was a worthwhile task; the United States believed that requesting the Commission to prepare such a draft statute would not serve the interests of either the Assembly or the international community unless Member States were committed to its outcome.

80. Member States should be given the opportunity to review carefully the report and its implications and to share their views with the Committee. Accordingly, the United States proposed that the Committee should adopt a

(Mr. Williamson, United States)

resolution requesting Governments to provide written comments on the report and requesting the Secretary-General to circulate those comments so that the Committee could consider them prior to the forty-eighth session of the General Assembly, at which time a decision could be taken on how best to proceed.

81. He stressed that his country was not necessarily opposed in principle to the establishment of an international criminal court. Rather, the United States wished to ensure that an international criminal court would not have the effect of undermining national and international efforts to control crime, including terrorism and drug trafficking. Flaws in the constituent instruments of international institutions tended to become magnified over time and such instruments were extremely difficult to amend. For that reason, it was particularly important that the Commission should avail itself of the views of Governments before beginning the preparation of a draft statute for an international criminal court.

82. Mr. JACOVIDES (Cyprus) said that the annual consideration by the Sixth Committee of the report of the International Law Commission (A/47/10) offered an opportunity to evaluate and comment on the report, to provide answers to questions of legal policy where the Commission required guidance from the General Assembly and to inject elements of a political approach whenever it was necessary to do so.

83. The Commission's report on the work of its forty-fourth session was of high quality, was relatively short and had been made available in good time. Paragraphs 11 to 14 outlined the Commission's work during the first year of its new members' term of office, the work had been focused on the draft Code of Crimes against the Peace and Security of Mankind and, in particular, the question of an international criminal jurisdiction; State responsibility, with special emphasis on the issue of countermeasures; and further consideration of the topic "International liability for injurious consequences arising out of acts not prohibited by international law". It had been necessary to postpone consideration of the topic "Relations between States and international organizations" for the reasons explained in the report. His delegation noted, in particular, paragraph 15 of the report, in which the Commission requested a clear indication by Governments as to whether it should embark on the elaboration of a draft statute of an international criminal court.

84. With regard to chapter II, Cyprus believed that the draft Code of Crimes against the Peace and Security of Mankind, adopted by the Commission on first reading in 1991, was a complete legal instrument encompassing three essential elements, namely, crimes, penalties and jurisdiction. Its main purpose could and should be to deter and to punish current and future violators of its provisions; that conviction had been strengthened by recent developments in the world. The instrument should be not only comprehensive, but also flexible and defensible, so as to ensure the widest possible acceptance and effectiveness. To that end, the Commission should examine more closely some aspects referred to in the comments and observations of Governments.

(Mr. Jacovides, Cyprus)

85. His delegation appreciated the Special Rapporteur's efforts to grapple with the difficult and complex issues entailed by the establishment of an international criminal jurisdiction, namely, the law to be applied, the jurisdiction of the court rationae materiae, complaints before the court, proceedings relating to compensation, handing over the subject of criminal proceedings to the court and the double hearing principle. It was regrettable that, for several years, the General Assembly had not provided the clear guidance and mandate which the Commission needed, as international developments warranted a much clearer and more positive response. The Gulf war, the situation in the Libyan Arab Jamahiriya and appeals from influential figures, as well as the renewed efforts of scholars and academics and the recent initiatives relating to the situation in the former Yugoslavia, had created sufficient momentum to break through the barriers of vacillation and indecision. In that spirit, the Commission had established a Working Group on the question of an international criminal jurisdiction, which had worked productively and had prepared the substantive report cited in full in paragraphs 393 to 557 of the Commission's report.

86. His delegation wished to make its position clear on two points. With regard to the relationship between the proposed court and the Code, it was of the view that both were necessary, feasible and desirable. The question remained, however, of who could be tried under international criminal jurisdiction, the State or the individual. Despite the considerable differences of opinion on the matter, draft article 5 of the Code, which had been adopted the previous year and corroborated by the commentaries on article 5 of the Code and on article 19 of the draft articles on State responsibility, clearly stated that the prosecution of an individual for a crime against the peace and security of mankind did not relieve a State of responsibility under international law for an act or omission attributed to it. The State thus remained responsible and was unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who had committed the crime. It could, moreover, be obliged to make reparation for injury caused by its agents, which provided the link between the items of the Code and State responsibility.

87. With regard to the Working Group's report, his delegation appreciated the work done, the considerations involved and the conclusions summarized in paragraph 11. Cyprus would have been happier if the approach had been less modest and if the recommendation had been for a court with compulsory and exclusive jurisdiction that was tied, although not exclusively, to the Code of crimes. Nevertheless, the door was left open for subsequent expansion, once the criminal jurisdiction was established and had proved its practicability. It was currently important for the Committee to accept that the structure suggested by the Commission's Working Group was workable and that the General Assembly should give a clear mandate to the Commission to proceed with the elaboration of a Draft Statute for the proposed international court.

(Mr. Jacovides, Cyprus)

88. With regard to Chapter III of the Report on "State responsibility", the delegation of Cyprus was pleased with the progress achieved by the Commission. State responsibility had been transformed from the traditional context of dealing primarily with injury to aliens to its current and much broader context, which covered the interests of international public order and of the whole international community. There was still scope for its progressive development and he urged the Commission to continue to promote contemporary notions of international law, such as jus cogens, obligations erga omnes, and action against international crimes.

89. With regard to the legal regime of countermeasures, his delegation would confine itself to the following comments: (a) the scope of countermeasures should be narrowly defined, since they could lend themselves to abuse at the expense of weaker States; (b) countermeasures should not be punitive, but aimed at restitution and reparation or compensation; (c) countermeasures should be subject to a third-party settlement procedure and should be applied, if at all, objectively and not subjectively or abusively; (d) the other peremptory norms of international law (jus cogens) could not be subject to derogation equally in the case of countermeasures; and (e) other substantial limitation factors, such as violations of basic human rights, were also applicable.

90. In connection with the quality of the material on those issues which had been included in the report of the Special Rapporteur, his delegation wished to stress in particular the following elements: the importance of third-party dispute settlement procedures; the absolute prohibition of countermeasures involving the use of armed force, which was prohibited under Article 2 (4) of the Charter and the principle of jus cogens.

91. With regard to the articles proposed by the Special Rapporteur in his fourth report, he considered, firstly, that in draft article 13 on "Proportionality", the expression "not to be disproportionate" was preferable to the wording "not be out of proportion" and, secondly, that draft article 14 should indicate that the prohibition of the threat or use of force was a peremptory norm par excellence, since, as currently worded, the draft article created the impression that the prohibition was in a different category.

92. With reference to Chapter IV of the Report on "International liability for injurious consequences arising out of acts not prohibited by international law", his delegation had taken note of its consideration by the Commission and the conclusions reached. The final Chapter of the report contained even more interesting material than usual.

93. He welcomed the decision on the planning of the Commission's activities for the quinquennium. In that connection, he applauded the Commission's targets for that period with respect to the law of non-navigational uses of international watercourses, the draft Code of Crimes against the Peace and Security of Mankind, and State responsibility.

(Mr. Jacovides, Cyprus)

94. His delegation noted with approval the work undertaken by the Commission in its long-term programme of work. In previous debates on the issue, Cyprus had suggested two areas of the law which could be looked into by the Commission: the first concerned the implementation of United Nations resolutions and the legal consequences arising out of their non-implementation, and the second was the legally binding nature of Security Council resolutions, in the context of Article 25 of the Charter, and of the advisory opinion of the International Court of Justice on Namibia. Over a period of years, his delegation had requested the inclusion in the agenda of the General Assembly of an item on implementation of United Nations resolutions. That item appeared on the agenda of the current session of the Assembly and it would be appropriate to consider, even informally, ways and means in which it could be given more concrete content.

95. The Commission's long-term programme of work also provided the opportunity to include among the items to be considered by the Commission in due course the item of the content of the notion of jus cogens or peremptory norms of international law. That principle had been established in 1969 by the Vienna Convention on the Law of Treaties. However its legal content had yet to be defined by an authoritative body. On the basis of the Commission's findings, which could be included in a report or study, and not necessarily in the form of a draft convention, the representatives of States would have the opportunity to express their views, either in the Sixth Committee or through written comments, thereby helping the process of giving exact legal meaning to a principle solemnly accepted and embodied in the above-mentioned convention. In the absence of such a definition, the principle could mean a great deal to some and very little to others, a phenomenon that was not conducive to the objectivity which should characterize a legal principle.

96. He also noted the concrete possibilities discussed in terms of the Commission's contribution to the United Nations Decade of International Law. It was evident that, by its very nature and stature, the Commission should be making a major input to achieving the objectives of the Decade, as it had been doing through its normal work. It also concurred with the Commission's constructive cooperation with outstanding regional bodies, such as the Asian-African Legal Consultative Committee, the European Committee on Legal Cooperation, and the Inter-American Juridical Committee. Nevertheless, there was still scope for closer cooperation with other groups, such as the Non-Aligned Movement and the Commonwealth.

97. Mr. YAMADA (Japan), referring to the changes witnessed in recent years, notably the end of the cold war and the Gulf crisis, said that the international community was in a period of transition from confrontation to cooperation and seeking a new and peaceful world order. As circumstances in the international arena evolved, there was bound to arise new problems which would be difficult, if not impossible, to resolve by resorting to traditional international law. On the other hand, should a country choose to ignore international law, there would be even greater need for solidarity on the part

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of the international community to ensure that the accepted rules of international law were duly observed.

98. In order to construct a new order based on peaceful and stable relations among nations, it was necessary to advance the rule of law and, towards that end, the international community needed to pursue twin objectives. Firstly, it must promote the progressive development and codification of international law in order to ensure an adequate response to new needs. In that connection, it was important to promote the elaboration of rules in new fields, such as the human environment, in which increasingly serious problems were anticipated in the following century. Secondly, it was necessary to ensure that the accepted rules of international law were observed. Towards that end, the international community should stand united in countering all violations of international law which could threaten the foundations of the world order and should strive to eliminate the discrepancies between multilateral treaty provisions and the domestic laws of States parties to the treaties.

99. In light of those circumstances, the task of the Commission in promoting the progressive development and codification of international law was becoming even more crucial. Instead of focusing on the codification of customary international law, the Commission must in future place greater emphasis on the progressive development of international law and effectively address the newly emerging needs of the rapidly changing international community. Indeed, the degree to which the Commission successfully fulfilled that task would determine its raison d'être in the future.

100. The Commission had several ongoing works entrusted to it by the General Assembly and the time had come to give new life to the Commission and to prepare its long-term programme. He hoped that during the current quinquennium the Commission would be able to finalize the draft articles on international watercourses and the draft Code of Crimes against the Peace and Security of Mankind, as well as the first reading of the draft articles on State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. If the General Assembly so decided, it could embark on the item of the establishment of an international criminal court.

101. The Commission's consideration of the possible establishment of an international criminal court revealed the divergencies of views among its members. The General Assembly should therefore take a decision on the project and should do so in a clear-cut manner.

102. The idea of establishing an international criminal court had been around for a long time and represented the final goal of cooperation among States for international law enforcement in criminal matters. History showed, however, that that was no easy matter. For many years, States had not been ready to accept such a mechanism and, in order to ensure the suppression and punishment of certain serious international crimes, the international community had made

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efforts to develop multilateral treaties by which to oblige States to prosecute and punish such crimes by sending the case to an internal court or to extradite offenders. Particularly in the case of terrorism, States preferred to establish norms to adjust or modify their national criminal codes and to secure national jurisdiction over the crime, instead of establishing an international criminal court outright.

103. However, he sensed that both Governments and world public opinion recognized the gross inadequacy of the current international criminal justice system and the need to establish a special court. The time had come to instruct the Commission to draft a Statute and to propose a concrete and realistic way leading to its establishment. He hoped that at its current session, the General Assembly would give a new mandate to the Commission in order to enable it to proceed with the drafting of the Statute.

104. As for the method of creating the court, he agreed that the court should be created by a Statute in the form of a treaty agreed to by States parties. He supported the Working Group's conclusion that, at least in its first phase of operations, the court should not be a standing body since, until it proved its effectiveness, it would thus avoid the greater cost incurred by a permanent body. However, there was no doubt that a permanent court would better ensure the independence and impartiality of its judgements and, since it dealt with criminal cases, the model of a court of arbitration called into operation whenever required could not be automatically applied. The nature of the court, whether it was desirable to set it up as a full time body or not, should be decided after taking into account the nature and range of its jurisdiction, so that the court could respond properly to the needs of the international community.

105. The idea that, at least in the beginning, the court should have neither compulsory nor exclusive jurisdiction was a realistic one and would facilitate the acceptance of its Statute by a larger number of States. Even if in the course of negotiations States considered it opportune to set up compulsory jurisdiction on some extremely serious crimes, the range of such cases must be carefully limited because such a determination could give rise to serious conflicts with national criminal jurisdictions, especially in cases of crime whose suppression was ensured by a developed international cooperation mechanism. The nature and range of "jurisdiction" must be carefully studied while taking into due consideration the effectiveness of the existing system and guaranteeing the non-disturbance of the well-established function of that system.

106. With regard to the relationship between the court and the draft Code of Crimes against the Peace and Security of Mankind, Japan supported the proposal of the Working Group that the Statute of the Court and Code must be separate legal instruments. Although it was desirable that States should become parties to both instruments, the international community should start from the point of view that the separation could serve to increase the number of States willing to become parties to at least one of them.

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107. The Working Group had also considered how it might best make use of the International Court of Justice. In that connection, taking into account the reputation which the Court enjoyed, it might be a good idea to study further the possibility that it could play a role in criminal matters. In doing so, an effort should be made not to disturb the function and the role which the Court currently played with the full support of the international community.

108. Lastly, he hoped that the Commission would proceed with prudence to ensure the widest possible acceptance of the Statute. Japan supported the approach of the Working Group to first establish a flexible and supplementary facility for States; a more extensive and ambitious plan could be discussed at a later stage.

The meeting rose at 1.15 p.m.